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In the

Supreme Court of the United States

October Term, 1962

No. 754

DARRELL V. BOYLAN, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on November 19th, 1962. By Order dated December 19th, 1962, per Justice Stewart, petitioner was granted until January 18th, 1963 in which to file this Petition. Stay of Execution of the Judgment of the Court of Appeals for the Ninth Circuit was granted by the Court of Appeals by Order dated January ___, 1963.

OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon, issued on October 20, 1961, printed in Appendix "A" hereto, infra, p. , has not been reported. The opinion of the Court of Appeals for the Ninth Circuit, printed in Appendix "B" hereto, infra, p. , has not yet been reported.

JURISDICTION

The District Court has jurisdiction of this cause by virtue of 49 USCA 917(a); the Court of Appeals has jurisdiction by virtue of 28 USCA 1291; the jurisdiction of this Court is invoked under 28 USCA, Sec. 1254(1).

QUESTIONS PRESENTED

1. Can the Federal government under the Commerce Clause require an owner of watercraft to secure a permit as a "contract carrier" from the Interstate Commerce Commission as a condition precedent to a demise charter of such watercraft to a shipper for the transportation by that shipper of his own commodities in interstate commerce where such commodities are "regulated" pursuant to Part III of the Interstate Commerce Act.

2. Can the Federal government impose a fine upon a vessel owner where he charters his vessel to a shipper

who, without the knowledge and consent of the vessel owner, utilizes the chartered equipment to transport his own commodities in interstate commerce, i.e., can A be convicted of a crime by reason of the act of B over whom he exercises no control, whose act was without his knowledge or consent, and which was lawful and proper when committed by A?

3. Does a statute requiring a code of conduct such as outlined in Question 2 above establish a rule or standard of conduct which is so vague and indefinite as to be no rule or standard at all?

4. Is a Federal statute prohibiting a vessel owner from demise chartering his vessel to a shipper for the transportation of the shipper's own lawful cargo reasonably necessary to effectuate a legitimate regulatory purpose or is it not capricious, arbitrary and discriminatory, and an unwarranted invasion of the property rights of the vessel owner?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions which are relevant to decision of this case, the pertinent text of which is set forth in Appendix "C" hereto, are the Fifth Amendment of the United States Constitution; Section 309(f) of the Interstate Commerce Act, 49

USCA 909(f); and Section 302(e) of the Interstate Commerce Act, 49 USCA 902(e), and Section 317(a) of the Interstate Commerce Act, 49 USCA 917(a).

STATEMENT

In January, 1961, the United States filed an information against the defendant in the United States District Court, Eastern District of Washington, charging defendant with three violations of Title 49 USCA Sections 309(f) and 917(a).[1] Specifically, defendant was charged with having engaged in the business of a contract carrier by water in interstate commerce by furnishing for compensation (under lease) a tug to Montag-Halvorson-McLaughlin and Associates, a construction firm, which was used by that construction firm to tow a barge leased to it and loaded with construction equipment.

Subsequently, upon motion of the defendant, the cause was transferred to the United States District Court for the District of Oregon.

In March, 1961, defendant filed a motion to dismiss the information on the grounds that the statutes which defendant is alleged to have violated are unconstitu-

1. While the Information charges a violation of 49 USCA 309(f), it was patent that the correct section should have been Section 909(f). 49 USCA 909(f) and Section 309(f) of the Interstate Commerce Act are identical. In any event, both the United States and the defendant have treated the Information as having correctly stated Section 909(f) of Title 49 instead of 309(f).

tional in that they violate the Fifth Amendment of the Constitution by depriving defendant of his property without due process of law. Thereafter, briefs were filed by the respective parties, the issues and facts stipulated to, and oral arguments presented. From inception of the case, both parties recognized it as a "test" case, which would be decided on issues of law. In October, 1961, the District Court overruled the motion to dismiss, sentenced the defendant and he appealed to the Court of Appeals for the Ninth Circuit.

Thereafter, briefs were submitted and oral arguments presented to that court. On November 19th, 1962, the Court of Appeals issued its opinion affirming the District Court. Thereafter, the defendant secured a stay of judgment and an extension of time in which to file a petition for writ of certiorari with this Court.

The constitutionality of 49 USCA 902(e) is involved in this appeal. That statute, insofar as material here, reads as follows:

> "(e) The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (2) of this section and the exception therein) by water of passengers or property in interstate or foreign commerce.
>
> *The furnishing for compensation (under a char-*

ter, lease or other agreement) of a vessel, to a person other than a carrier subject to this chapter and chapters 1 and 8 of this title, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'." (Emphasis added).

Neither of the two statutes cited in the Information are directly involved in the consideration of this appeal. Section 909(f) provides, in essence, that no person shall engage in the business of a contract carrier by water until he or it holds an effective permit, issued by the Interstate Commerce Commission authorizing such operation. Section 917(a) provides, in essence, that any person who knowingly and wilfully violates any provision of the chapter [Title 49, Chapter 12] or any rule, regulation, requirement, or order thereunder, etc. shall be subject for each offense to a fine not exceeding $500.

If 49 USCA 902(e) is valid, there can be no question of defendant's guilt. He holds no permit issued by the Interstate Commerce Commission; he did lease for compensation a tug to the construction firm mentioned in the Information and on the dates alleged, and the lessee

did transport its own construction equipment by water in interstate commerce using the leased tug.[2]

Defendant asserts in this petition three specific grounds of unconstitutionality, as follows:

(1) The statute (49 USCA 902(e)) violates the Fifth Amendment of the U.S. Constitution in that it deprives the defendant of due process of law in denying to him the right to lease or charter his water transportation equipment to persons other than carriers, when such a lease or charter could not and does not directly or substantially affect interstate commerce; the statute has no reasonable basis in fact; the business activity thus proscribed cannot properly be subjected to economic regulation in such fashion; and it imposes an arbitrary restraint upon the liberty of contract.

2. The Court is asked to take judicial notice that at the time the United States filed its Information against the petitioner, petitioner was involved in a proceeding before the Interstate Commerce Commission, Docket W-1147, in which petitioner, inter alia, had applied for a permit as a contract carrier in furnishing vessels for compensation under 49 USCA 902(e), or in the alternative for a certificate of exemption under that statute. Such application was filed in 1960, and hearings were held thereon in December, 1960 and April, 1961. At that time the last hearing was held in April, 1961, petitioner was already involved in these proceedings before the District Court. On October 11, 1961, the Hearing Examiner recommended denial of petitioner's application for a certificate and permit, on the grounds that granting a permit would not be consistent with the public interest and that he had not established that he was entitled to an order of exemption under the provisions of Section 302(e) of the Act (49 USCA 902(e)). Reference to the Examiner's report, on file with the Interstate Commerce Commission, will disclose that the Examiner characterized the lease to Montag-Halvorsen-McLaughlin & Associates as "towage," whereas the Information, involving the same facts, charges a violation by leasing. Petitioner then filed Exceptions to the Examiner's report but before the same were heard petitioner withdrew his application in May, 1962. The Court will appreciate the incongruity of petitioner applying for "rights" and, at the same time, contesting the constitutionality of the very statute under which the application was made.

(2) The statute violates the Fifth Amendment in that it is void for indefiniteness and uncertainty where, as in the instant case, the defendant can be convicted of a violation of a penal statute (49 USCA 917(a)) without any intent to violate the same and dependent wholly upon the use to which the lessee may choose to put the water transportation equipment so leased or chartered.[3]

(3) The statute violates the Fifth Amendment of the U.S. Constitution in that it deprives the defendant of due process of law in denying to him the right to lease or charter his equipment as aforesaid when other types of carriers are not so prohibited; i.e., there is no valid basis of "classification" upon which such a distinction can legally be predicated.

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3. Section 303 of the Interstate Commerce Act, (49 USCA 903) exempts from the Act certain categories or types of transportation movements and commodities: e.g., bulk commodities, liquid cargoes in bulk in tank vessels, etc. 49 USCA 902(e), the statute under attack, in effect proscribes the leasing of equipment to a person, other than a carrier, to be used to transport that person's own "property," no recognition being given to the fact that the lessee may transport bulk commodities on the vessel so leased in which case the Act possibly would not apply and there would be no violation on the part of defendant. Even though the defendant may, in his charter or lease, forbid the lessee to use the leased equipment for the transportation of anything other than "exempt" commodities, the breach of this prohibition by the lessee (while not a violation of the Act as to the lessee) could subject the defendant to the penal provisions of 49 USCA 917(a) without any knowledge or acquiescence on his part to the type of transportation movement performed by the lessee. Thus, if the statute is constitutionally valid, the defendant could be convicted of a violation of 49 USCA 917(a) without any intent on his part, and by reason of the act of a third party over whom he has no effective measure of control.

REASONS FOR GRANTING THE WRIT

I

The issue posed here are questions of first impression before this Court. The constitutionality of Section 302(e) of the Interstate Commerce Act is raised here for the first time since it was enacted over 22 years ago. There are no decisions on whether the Congress has the power, under the Commerce Clause, to require a lessor of water transportation equipment to secure a permit as a "contract carrier" as a condition precedent to doing business.*

As the Interstate Commerce Commission has noted, vessel furnishers provide a pool of equipment from which water carriers may draw during emergencies and peak-load periods. *G. M. Cox Shipyard, Inc.*, 260 ICC 21, (1943). There are many hundreds of vessel owners throughout the country, controlling thousands of vessels, who presently operate their vessels as private carriers. If 49 USCA 902(e) is constitutionally valid, these vessel owners, like defendant, cannot safely lease or charter such vessels to any third party, other than a carrier as defined in the Interstate Commerce Act. It is indeed anomalous that a shipper can *purchase* a vessel outright and utilize it to transport his own property by water,

* For Congressional history, see 84 Cong. Rec. 9979, July 25, 1939 et.seq. Also, 86 Cong. Rec. 5858 et. seq.

yet he cannot lease such a vessel unless he does so from an owner who possesses a "license" from the Interstate Commerce Commission. The ownership of water transportation is thus not proscribed—only the leasing of it.

The water transportation industry is in a quandary over the proper interpretation of 49 USCA 902(e). As drafted, it seems to apply to all "property" which a shipper may choose to transport on leased equipment, yet other provisions of the Interstate Commerce Act clearly exempt from the purview of the Act the transportation of specific types of commodities such as bulk commodities and liquids in bulk on tank vessels, not to mention the transportation of all types of property within terminal areas, the transportation of property within a single harbor or contiguous harbors, the movement of contractor's equipment, etc. If the broad language of 49 USCA 902(e) is to be interpreted literally, it would proscribe the leasing of water transportation equipment, even that which is to be used by the lessee to transport commodities which are otherwise exempt from the impact of the Interstate Commerce Act. Yet, no one is really sure. A few of the decisions which have arisen involving the statute under attack appear to countenance the leasing of equipment to haul exempt commodities without the necessity of the lessor securing a permit from the Interstate Commerce Commission. Others raise an infer-

ence that a permit would be required for all types of commodities, whether or not exempted under the Act. Compare *Barnett Line V. United States*, 326 U.S. 179, 89 L.ed. 2128 (1945), where this Court held that the Interstate Commerce Commission should, in passing on a "grandfather" application for a vessel furnisher permit, take into consideration the lease of vessels to shippers utilizing the same to transport so-called "exempt" commodities.

Moreover, as drafted, the statute clearly appears to be void and unenforceable for indefiniteness and vagueness. Reduced to its simplest terms, it can be applied to punish a vessel owner leasing his equipment to a third-party shipper who, without the knowledge or acquiescence of the lessor, uses such equipment to transport his own property (non-exempt under the Interstate Commerce Act) in interstate commerce. The net effect is that a person can be convicted and punished for a lawful ancillary act of a third person over whom he has no measure of authority or control. For example, let us suppose that the defendant leased his tug to the construction firm under a charter, the terms of which specifically prohibit the use of such tug to transport any commodities, other than bulk commodities and/or "contractor's equipment" in interstate commerce.

Let us further suppose that the lessee, in breach of

the charter agreement and without the knowledge or acquiescence of the lessor, utilizes the tug to transport "non-exempt" commodities owned by it in interstate commerce; i.e., wholly regulated commodities such as packaged goods, steel pipe, etc. No regulatory statutes exist whereby the lessee could be held guilty of any offense as there is no legal impediment to any person transporting his own lawful commodities using his own equipment or equipment leased to him. Only by proceeding against the lessor, under 49 USCA 902(e) and related statutes, could any penalty be imposed. Yet, the lessor has committed no offense. He had no intent to violate the statute; to the contrary, he endeavored to prevent the equipment from being used in contravention of 49 USCA 902(e). At best the statute is unenforceable and at the worst makes it possible to penalize a person for the act of another over whom he has no control.

Viewed in this light, it would appear this Court has only two alternatives, neither of which is palatable:

(1) If the term "property" as used in 49 USCA 902(e) is defined to mean "all property transported by the lessee," as its broad language seems to indicate, then a gross inconsistency results in that certain commodities are already exempted from the purview of the act. Moreover, it is somewhat incongruous, to say the least, to hold that it is permissible to transport all types

of property on equipment which is wholly owned by the person so transporting, and at the same time condemn the transportation of the same property if consummated by the use of leased equipment. Such an interpretation would result in the lessor being penalized for an act committed by a third party, over whom he could not have any degree of control.[4]

Furthermore, 49 USCA 917(a) condemns in broad terms any person who "knowingly and willfully violates any provision of this chapter." 49 USCA 909(f) prohibits any person from engaging in the business of a contract carrier by water unless he or it holds an effective permit. By definition, the statute under attack (49 USCA 902(e)) makes any person who leases equipment to any person other than a carrier a "contract carrier by water." Therefore, the terms "knowingly and willfully" can only apply to the act of a vessel owner leasing equipment to a third person not a carrier. The mere act of leasing his equipment establishes that the vessel owner entered into such a lease, "knowingly and willfully." If he leases it, knowing that he does not possess a permit from the Interstate Com-

4. The lease or charter referred to here and throughout this petition is, of course, on a "bareboat basis" wherein the vessel is furnished without crew and under whic hthe charterer (lessee) becomes the owner 'pro haec vice.' Obviously, under a time charter in which the lessor furnishes the master and crew, the lessor could and no doubt would exercise control over the use of the vessel. That question is not involved in this appeal; there is no allegation in the Information that the defendant furnished the crew of the tug which was leased.

merce Commission, then he is guilty of a violation of the Act even though the lessee uses the equipment for a lawful purpose and even though the lessor cannot, in any real and effective sense, control the use to which the lessee may put the equipment.

Never, to petitioner's knowledge, has any other statute purported to impose a penalty upon A because, without A's knowledge and acquiescence, B uses equipment leased from A for a perfectly lawful purpose. Even under Title 21 USCA relating to use, possession and transportation of narcotic drugs, the operator of a vessel upon which narcotics may be discovered is not guilty of a violation of the act if he satisfies the authorities that he had no knowledge of and used due diligence to prevent the presence of the narcotic drug aboard his vessel. Indeed, there are a respectable number of cases reported in which the lessor of equipment is not held guilty of aiding and abetting the lessee thereof in using the equipment for an unlawful purpose, *even when the lessor knew that the lessee intended using the equipment for an unlawful purpose.* See Annotation at 108 ALR 331. It would indeed be unusual to penalize a lessor for the act of the lessee when the lessor had no knowledge of and could not control the lessee in using the equipment for a lawful purpose. Yet, that is the effect of the statute under consideration.

(2) If, on the other hand, the term "property as used in the statute is defined to mean "all property transported by the lessee, *except exempt commodities or property not regulated by the Act,*" then words are being read into the statute which are not there. Moreover, there are no means by which the statute can be enforced against the lessee who, quite patently, is using the equipment for a lawful purpose. No one has yet intimated that a person can be legally prohibited from transporting his own lawful property, nor does the Interstate Commerce Act or any other related statute impose such a prohibition. Thus, if the word "property" is interpreted in this fashion, the following elements would have to be proved before a lessor could be convicted of a violation:

(1) That the lessee transported non-exempt commodities;

(2) That the lessor knew or should have known that the lessee was using the equipment for this purpose and made no effort to prevent him from doing so; and

(3) That the lessor "knowingly and willfully" violated the Interstate Commerce Act.

Apropo of the question of "intent," the entirety of Part III of the Interstate Commerce Act is vague and ambiguous, because of the manner in which, and the

placement of, the phrase, "knowingly and willfully." 49 USCA 917(a) condemns any person who - - - -

> "* * * *knowingly and willfully* violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate or permit, for which no penalty is otherwise provided, * * *" (Emphasis added).

At what point does a lessor of water transportation equipment "knowingly and willfully" violate the chapter? 49 USCA 902(e) merely relates to the definition of a contract carrier and contains no inhibition or prohibition whatever. 49 USCA 909(f) prohibits a person from engaging in the business of a contract carrier by water unless she or it holds an effective permit issued by the Interstate Commerce Commission. Depending upon the interpretation to be given to the term "property" as used in 49 USCA 902(e), a lessor of equipment may or may not need a permit in order to lease equipment to be used to transport exempt commodities. If the term "property" is used in an all-inclusive sense so that it embraces within its ambit exempt commodities, then has the lessor "knowingly and willfully" violated the Act by the mere act of leasing or is something more required?[5] As this Court said in *Cramp v. Board*

5. See also, *Morrisette v. U.S.*, 342 U.S. 246; *Boyce Motor Lines v. U.S.*, 342 U.S. 337; *Musser v. Utah*, 333 U.S. 95; and *Dotterweich v. U.S.*, 320 U.S. 264.

of Public Instruction, 368 US 278, 7 L.ed.(2d) 285, 82 S.Ct. 275 (1961),

> "We think this case demonstrably falls within the compass of those decisions of the Court which hold that '* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' *Connally v. General Construction Co.*, 269 US 385, 391, 70 L.ed. 322, 328, 46 S.Ct. 126. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' *Lanzetta v. New Jersey*, 306 US 451, 453, 83 L.ed. 888, 890, 59 S.Ct. 618. 'Words which are vague and fluid * * * may be as much a trap for the innocent as the ancient laws of Caligula.' *United States v. Cardiff*, 344 US 174, 176, 97 L.ed. 200, 202, 73 S.Ct. 189. 'In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.' *Champlin Ref. Co. v. Corporation Com. of Oklahoma*, 286 US 210, 243, 76 L.ed. 1062, 1083, 52 S.Ct. 559, 86 ALR 403. * * *"

In *Barrett*, *supra*, this Court indicated that no permit is required of a vessel furnisher if only exempt commodities are to be carried in the leased vessels. 326 US at Pages 189 and 194. Petitioner respectfully sug-

gests that it was not necessary for the Court in that case to make the statement so broad, as such a finding was not necessary to the determination of that case. If, however, the Court adheres to that position, then the petitioner's contentions are strengthened, as the vagueness, ambiguity, and unenforceability of the provisions relating to vessel furnishers become more dramatic; i.e., the end result is that a vessel furnisher who leases his equipment restricting its use solely to the transportation of exempt commodities could be held guilty of a violation of 49 USCA 917(a) if the lessee wrongfully, and in breach of the charter, uses the equipment to transport non-exempt commodities. If, on the other hand, the Court should hold that the vessel furnisher must know of the lessee's intention to use the equipment to haul non-exempt commodities before a violation of 49 USCA 917(a) could be proved, then a glaring loophole is opened in the regulatory scheme. The burden of proving knowledge on the part of the lessor would be almost insuperable. Over night, vessel owners would be chartering vessels to shippers under charters the terms of which prohibit the transportation of non-exempt commodities. Then, the vessel owners could sit back with impunity and legitimately disavow any knowledge of what use the lessee is putting the equipment. Meanwhile, the lessee is doing no unlawful act for which criminal penalties could be imposed as there

is no law, statute or regulation which purports to prohibit him from transporting his own commodities. Moreover, it is to be doubted that any such statute would be constitutional.

Petitioner respectfully submits that this dilemma is the direct result of a lack of appreciation on the part of the Congress concerning the element of "control" where criminal penalties are involved. There is a fundamental distinction between a contract of affreightment on the one hand and a bareboat charter on the other. In the former, the vessel owner merely "leases" space in his vessel and retains full control over the operation and movement of the vessel. In the latter, the vessel owner transfers full beneficial "ownership" for the time being to the lessee who is privileged to utilize the vessel as he sees fit and to transport commodities in any lawful trade he wishes. A legislative declaration that a charter is the equivalent of a contract of affreightment (and this, after all, is really what 49 USCA 902(e) attempts to do) ignores reality and the basic fundamental distinctions built up over centuries of water transportation.

Petitioner concedes that Congress had a laudable purpose in mind in enacting Part III of the Act and specifically 49 USCA 902(e). For the last four or five Congressional sessions the Interstate Commerce Com-

mission has sought to persuade Congress to enact a statute which would preclude the leasing of vehicles by motor carrier owners under Part II of the Act, but to no avail. Almost in desperation, the Interstate Commerce Commission finally adopted rules and regulations governing the terms under which vehicle leases could be made and this Court, in *American Trucking Association v. United States*, 344 US 298, 97 L.ed. 337, 73 S.Ct. 307 (1952) sustained them. Of even more immediate interest is *United States v. Drum et al*, 368 US 370, 7 L.ed.(2d) 360, 82 S.Ct. 408, (1961) in which this Court approved the Commission's substitution of a test of "substance" rather than "control." In *Drum*, the Court held that the shifting of three economic burdens from the lessee to the lessor-drivers justified the Commission's determination that a "private carriage" scheme was in reality a "for hire" subterfuge. These were:

(1) The substantial capital investment in the tractors along with the risk of premature loss, was borne by the drivers;

(2) They undertook the cost of maintaining the vehicles and their own living expenses on the road; and

(3) They bore the risk of "non-utilization of high-priced equipment" and of their own unemployment.

It is noteworthy that in petitioner's case, *none of these three factors were present.*

Whether a test of "control" is used, or a test of "substance," in legal contemplation the lease of the vessel by petitioner was that and nothing more. The lessee was engaged in and performed only private carriage. In truth, Congress in 49 USCA 902(e) has attempted, by legislative fiat, to convert private carriage into carriage for hire by a contract carrier.

II

As pointed out before, petitioner has been unable to find any Federal cases directly in point on the question of how far may Congress go, under the Commerce Clause, in regulating the transportation business, before violating the Fifth Amendment. There are a number of well-reasoned cases involving the right of *states* to regulate private carriage as an ancillary method of regulating common and contract carriers without violating the Fourteenth Amendment,[6] all of which petitioner relied upon in the Court of Appeals. The Court of Appeals, however, dismissed the applicability of the state cases and held that the principal Federal cases cited by petitioner (*Michigan Utilities Commission v.*

6. *Brinks Express Company v. Public Service Commission*, 117 Pa. Super. 268, 178 Atl. 346; *Hertz Driveurself Stations, Inc. v. Siggins*, 359 Pa. 25, 58 A.2d 464; *Hertz Corporation v. Heltzel and Snyder, et al*, 217 Ore. 205, 341 P.2d 1063.

Duke, 266 U.S. 570 (1925) and *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583 (1926) were passe', stating:

> "* * * But if *Duke* and *Frost* ever were authority for such a proposition, they are no longer so in view of *Nebbia v. New York*, 291 U.S. 502, discussed below."

While the Court of Appeals conceded that *Nebbia* involved only *price regulation*—as distinguished from prohibition to engage in a lawful business at all—, it held that *Nebbia* was "equally applicable with regard to all economic regulation," citing with approval 1 Davis, Administrative Law Treatise," Sec. 3.09, page 205 where the author stated:

> "* * * The concept of business affected with a public interest has now disappeared from federal constitutional law. * * *" (citing *Olsen v. Nebraska*, 313 U.S. 236 and *Nebbia*).

The test to be applied, according to the Court of Appeals, was as follows:

> "* * * But the requirements of due process are satisfied if the law passed in the exercise of the Commerce Clause has a reasonable relation to a legitimate legislative purpose and is not arbitrary, capricious or discriminatory. If the means chosen are appropriate to the permissible end, there is little

scope for the operation of the due process clause,' *Virginia Railway Co. v. System Federation No. 40*, 300 U.S. 515, 558. * * *"

Petitioner submits that this is a classic instance of the danger of pinning "labels" on constitutional doctrines. To distinguish between the language of the Court of Appeals quoted above and the doctrine of "affected with a public purpose" is but an exercise in semantics. As petitioner understands the doctrine of "affected with a public purpose," it means nothing more nor less than a convenient label to describe the extent to which the Congress is authorized to restrict the rights of private property owners . . . and that extent is measured by what is reasonably necessary to effectuate a legitimate regulatory purpose without at the same time being arbitrary, capricious or discriminatory.

But most assuredly *Nebbia* is not in point. To equate the authority to regulate prices with the authority to prohibit absolutely the right to engage in a business unless a permit is secured is stretching analogy beyond the breaking point.

Petitioner respectfully submits that the rationale of this case is to be found, not in *Nebbia*, but in *Champlin Refining Company v. U.S.*, 329 U.S. 29, 91 L.ed. 22

(1946) and *U.S. v. Champlin Refining Company*, 341 U.S. 290, 95 L.ed. 949 (1950).

In the first *Champlin* case, this Court had before it the question of the jurisdiction of the Interstate Commerce Commission to require a refining company, transporting its own products in its own pipelines in interstate commerce, to submit valuation data, maps and charts pertaining to its pipeline. In many respects, the statute there under consideration is analagous to 49 USCA 902(e) involved in this case. There, Section 1 of the Interstate Commerce Act, subsection (3)(a) was being construed. It reads as follows:

> "The term 'common carrier' as used in this Act shall include all pipe-line companies; express companies; sleeping car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire."

This Court, in the first *Champlin* case, held that Champlin's operation was transportation within the meaning of the Act and that the statute supported the Commission's order to furnish information. Champlin further contended that as construed the Act exceeded the commerce power of Congress and violated the due process clause of the Fifth Amendment because such an interpretation would convert a private pipe line into a public utility and thus require a private carrier to be-

come a common carrier. This Court refused to pass on the merits of Champlin's contention, stating merely that was "too premature and hypothetical to warrant consideration on this record." Justices Reed, Frankfurter, Douglas and Burton filed vigorous dissents on the grounds that the facts disclosed that Champlin was not transporting oil within the purview of the Act.

As might be expected, the matter was not permitted to rest. The Interstate Commerce Commission subsequently ordered Champlin to file annual, periodic and special reports; to institute and maintain a uniform system of accounts, and to file and publish its rate schedules. Champlin refused on the grounds that to impose the requirement of filing a schedule of rates would be to deprive it of its property without due process under the Fifth Amendment.

This Court held with Champlin, stating in part:

"* * * But it would be strange to suppose that Congress, in adopting a term broad enough to cover all competitive imbalances which might arise, intended that the Commission should make common carriers for hire out of private pipe lines whose services were unused, unsought after, and unneeded by independent producers, and whose presence fosters competition in markets heavily blanketed by large 'majors.' Such a step would at best be pointless; it might well subvert the chief purpose of the Act. * * *"

It would be superfluous to point out that in the two *Champlin* cases, this Court demonstrated it would violate the Fifth Amendment to require the *filing* of a rate schedule from a private carrier, whereas in *Nebbia*, it sanctioned the actual *regulation* of prices of milk. Petitioner respectfully submits that the distinction is not difficult to perceive: in *Nebbia* public health was involved and price regulation there bore a direct and immediate relationship to a legitimate legislative purpose, i.e., it was "reasonably necessary to effectuate a legitimate regulatory purpose"; in *Champlin*, to require even the filing of a rate schedule of a private carrier was found not to bear a direct and immediate relationship to a legitimate legislative purpose, nor were the means chosen "appropriate to the permissible end."

In this connection, it will be noted that the purpose of 49 USCA 902(e) was stated by the Commission in *G. M. Cox Shipyard, Inc.*, 260 ICC 20, 21 as:

> "• • • Regulation of applicant and other furnishers of vessels, as contemplated by section 302(e), results from their position in the national transportation system. They provide a pool of equipment from which other carriers draw during emergencies and peak-load periods. Unregulated use of this pool of equipment by shippers well might place them in the position of being able to use the charter market as leverage to enforce their demands for

unreasonable rates and discriminatory service from common and contract carriers * * *"

The Court will note the unduly broad speculation involved in this so-called legislative "purpose." In the first place, unregulated use of the equipment pool "might well" place shippers in a superior competitive position; there was no direct finding that this undubitably would happen. Second, it is quite patent that the supposed evil Congress was attempting to prevent was action on the part of shippers in leasing vessels. These shippers, like Champlin, were private carriers transporting their own commodities. Could Congress, in the light of the Champlin decisions, prohibit these shippers from leasing equipment from vessel owners without violating the due process clause of the Fifth Amendment? The answer is obviously in the negative. Could then Congress, in an ancillary fashion, prohibit vessel owners from leasing their vessels to shippers? Petitioner submits the answer here is equally clear. Leasing a vessel without the retention of any degree of control over it is a private endeavor—just as "private" as the act of the lessee in transporting his own commodities as a private carrier, and legislative declaration does not make it any less private.

Petitioner wishes to emphasize that no contention

is made here that Congress could not properly regulate the activities of vessel owners vis-a-vis safety. Nor could vessel owners deny the right of Congress to require them to file annual, periodic or special reports or to institute and maintain a uniform system of accounts. Here, however, Congress has gone far afield and has effectively foreclosed the right of a vessel owner to lease his vessels to private shippers to transport their own commodities on the theory, apparently, that since it could not regulate the private shippers, it might succeed in regulating the vessel owners.

In *Champlin*, Congress legislatively declared that all pipeline companies, even those transporting their own commodities, were "common carriers." In this case, Congress legislatively declared that all vessel owners, even those leasing equipment to private shippers to transport their own commodities, were "contract carriers." Had the last Champlin case taken the turn which developed in this case (the filing of an information against Champlin for "knowingly and willfully" violating the Interstate Commerce Act) we would have before us an identical situation. Petitioner submits that this case should and must be measured by the same standards.

III

While it is true that the Fifth Amendment, unlike the Fourteenth Amendment, contains no equal protection clause, and while due process and equal protection cannot be perfectly equated, discriminatory federal legislation may be so removed from any legitimate legislative objective that it violates the basic fairness which constitutes Fifth Amendment due process. *Bolling v. Sharpe*, 347 U.S. 497.

Is not the statute under consideration the keystone of a federally administered program which systematically and consciously discriminates against vessel owners who wish to charter their vessels to shippers engaged in transporting their own goods in interstate commerce? Can there be a "proper legislative purpose" in precluding a vessel owner from chartering his vessel to a shipper in interstate commerce while at the same time permitting the *same* vessel owner to charter the *same* vessel to the *same* shipper to be used in foreign commerce? Would not such an application of the power of the Commerce Clause deprive both the vessel owner and the shipper of their property without due process of law; i.e., the vessel owner of his constitutional right to make lawful use of his equipment and the shipper of his constitutional right to rent equipment for a lawful use?

If we assume that the proper interpretation of Part

III of the Act is that a vessel owner may charter his equipment to a shipper to transport "exempt" commodities, and the shipper wrongfully uses it to transport regulated commodities, without the knowledge or acquiescence of the vessel owner, is it "basic fairness" then to impose a fine upon the vessel owner? Is not the danger that the shipper-lessee might thus violate the charter and use the equipment to transport regulated commodities too remote and incidental to the main regulatory purpose of the Act to justify such a serious invasion of the property rights of that vessel owner?

Can Congress legally prohibit a private shipper from *purchasing* a vessel with which to transport his own commodities in interstate Commerce? If this power be denied Congress, could it legally prohibit that shipper from *leasing* a vessel to transport such commodities? In legal contemplation, there is no substantial distinction between the legal status of a bareboat charterer and the actual owner, and the charterer is termed the "owner for the time being." *Robinson on Admiralty*, Section 83.[7]

Could Congress, under the Commerce Clause, forbid a shipper from leasing a vessel to transport his own commodities so long as those commodities constituted

7. The Information charged the petitioner with furnishing "for compensation a tug * * *." Nothing was said about the crew thereof or whether or not petitioner supplied a crew. The charge being that of furnishing only the tug—and not the crew—it must be tested in that light.

lawful cargo? By analogy, *Champlin* held that a private carrier could not be required to file a schedule of rates, much less be absolutely prohibited from engaging in his own private mode of transportation. If Congress could not legally prohibit a private carrier from leasing equipment, could it legally prohibit a vessel owner, not otherwise engaging in transportation for hire and otherwise subject to the Interstate Commerce Act, from leasing his equipment?[8]

These are the questions which test the "basic fairness" constituting Fifth Amendment due process. The statute under attack is not merely an instance of a lack of uniformity—it is an instance of a lack of uniformity which is wholly inappropriate to any proper legislative purpose. However laudable the intent of Congress in seeking to regulate water transportation and to protect the common and contract carriers created by legislation, nonetheless it is still restricted to doing so in a fashion which is "basically fair."

The Court is hampered in this case by a lack of economic data upon which to predicate its decision. Insofar as petitioner can determine there is no such

8. Petitioner concedes that if he were a "common carrier" or true "contract carrier," already subject to the jurisdiction of the Commission under the Act, he might validly be prohibited from also engaging in business as a vessel furnisher. To do so would be a legitimate legislative purpose in effectively regulating that which should properly be regulated in the public interest. Compare 49 USCA 910 which precludes the granting of a "permit" as a contract carrier to a person holding a certificate as a common carrier except when found to be consistent with the public interest and with the national transportation policy of the Interstate Commerce Act.

basic economic data, nor has the Commission made any effort to compile the same. We have no way of knowing what impact, if any, the free and untrammeled right of vessel owners to lease their equipment to private shippers might have on the economic regulation of water transportation. For aught that the record shows, shippers might well prefer in nearly all instances to tender their commodities to the common carriers already certificated. Vessel operation is a precarious and costly venture in these troublous times, involving a high degree of liability and problems peculiar to admiralty in which few shippers have any experience. In these circumstances, and until some economic justification has been shown that regulation of vessel furnishers would effectuate a proper legislative purpose, such regulation as Part III would attempt to impose appears far too remote, speculative and incidental to the main regulatory purposes of the Act to justify such an unwarranted invasion into the property rights of the petitioner and others similarly situated.

CONCLUSION

The Court of Appeals in this case has decided an important question of first impression in federal law which has not been, but should be, decided by this Court. Moreover, in its reliance upon and application of *Nebbia*, it has decided that question in a way which

is in conflict with applicable decisions of this Court; i.e., the two *Champlin* cases, by bringing, for the first time the ambit of that decision squarely into conflict with the parameters of the two *Champlin* cases. This conflict should be resolved, particularly where, as in this case, the statute under attack is not consistent with the constitutional requirement of due process as it forbids the doing of an act in terms so vague and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application.

For the reasons set forth herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA
vs.
DARRELL V. BOYLAN
Defendant

No. C-19134
OPINION
October 20, 1961

SOLOMON, Judge:

This case is now before the court on defendant's motion to dismiss a criminal information charging him with operating as a contract carrier in interstate commerce without a permit from the Interstate Commerce Commission.

The defendant admits the acts constituting the offense. In other words, he admits that he leased his tug on three occasions to a contractor who used it to transport the contractor's property in interstate commerce in violation of provisions of the Interstate Commerce Act. However, defendant contends that §302(e) [49 U.S.C.A. §902 (c)] which brings defendant's activities under the Act is unconstitutional because:

(1) Congress cannot bring a business under regulation that is not affected with a public interest;

(2). The regulation of defendant's business of leasing equipment is unreasonable, arbitrary and discriminatory; and

(3) It deprives private shippers of the right to lease water equipment from the defendant.

Defendant also claims that the information must be dismissed because there was no finding that the leasing of equipment by the defendant was necessary to effectuate the national transportation policy:

1. Defendant asserts that Congress by legislative fiat, is regulating the leasing of equipment to private persons for use by such persons in the transportation of their own products when such business is not "affected with a public interest".

Defendant relies on *Hertz Corporation v. Heltzel and Snyder et al*, 217 Or. 205, 341 P.2d 1063 (1959), and *Hertz Driveurself Stations, Inc. v. Siggins*, 359 Pa. 25, 58 A.2d 464 (1948), in support of his position that §302(e) of the Act is unconstitutional. In both cases, the court held that the state was without authority to declare the leasing of motor vehicles as being affected with a public interest and thereby subject to regulation by the state. Defendant asserts that, by analogy, the same conclusion should be drawn with reference to the leasing of water transportation equipment.

In my view, these cases are not in point, for the reason that, unlike motor carriers, water transportation in interstate commerce is affected with a public interest. *Portland Tug & Barge Co. v. United States*, Or. 1944, 55 F. Supp. 723. See also *G. M. Cox Shipyard Inc. Applications*, 260 ICC 21 (1943) *Barrett Line v. United States*, 326 U.S. 179 (1945).

2. The defendant's claim of discrimination is without merit since the issue is one of reasonable classification. Different industries are subject to different regulations, and the fact that contract carriers are regulated and other types of carriers are not regulated may not be significant. *United States v. Delaware and Hudson Co.*, 213 U.S. 366 (1909). The defendant failed to meet his burden of proving the classification unreasable. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

3. The unconstitutionality of an act can only be raised by one who is directly affected thereby, and one cannot advance the rights of others as the basis for his challenge to the constitutionality of any act. *Jeffrey Mfg. Co. v. Blagg*. 235 U.S. 571 (1915). Here, the defendant has no standing to claim that the act is unconstitutional because it deprives shippers of the right to lease water equipment from the defendant.

Defendant has misread that portion of §302(e) which he asserts requires the Commission in the first instance to determine that defendant's carrier operations were not subject to an exemption before it can require defendant to become certificated. In my view, the defendant's operations as a water carrier in interstate commerce are subject to regulation until and unless he has obtained an exemption.

Defendant's motion to dismiss is overruled.

Appendix "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DARRELL V. BOYLAN
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 17,672
Nov. 19, 1962

Appeal from the United States District Court for the District of Oregon

Before: HAMLEY and KOELSCH, Circuit Judges and TAYLOR, District Judge

HAMLEY, Circuit Judge:

Darrell V. Boylan was convicted on all three counts of an information charging him with engaging in the business of a contract carrier by water without first obtaining a permit from the Interstate Commerce Commission (Commission). A fine of four hundred dollars was imposed on the first count. On the other two counts the imposition of sentence was suspended and Boylan was put on probation for a period of three years. Boylan appeals.

It is provided in section 309(f) of the Interstate Commerce Act (Act), 49 U.S.C., § 909(f), that, with exceptions not here material, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit issued by the Commission authorizing such operation.[1] Under section 317(a) of the Act, 49 U.S.C., § 917(a), a knowing and wilful violation of section 309(f) is a misdemeanor.

The cause was tried to the court on the following stipulated facts. In April and May, 1960, Boylan was engaged in business as Richland Tug and Ferry. On April 27, May 5, and May 11, 1960, under individual contracts or agreements, he furnished for compensation the tug "Bonnie B" to Montag-Halvorson-McLaughlin and Associates, a construction firm. On these occasions the tug was used by that firm in the Columbia River to tow its barge, loaded with the firm's construction equipment, from the Ice Harbor Dam Site in Washington, through the territorial waters of Oregon to the John Day Dam Site in Washington. On none of these occasions did Boylan hold a permit from the Interstate Com-

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[1]Under section 309(g), 49 U.S.C., § 909(g), the Commission, upon application being made, is required to issue such a permit

". . . if it finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act. . . ."

merce Commission authorizing him to engage in the business of a contract carrier by water.

Boylan concedes that in furnishing the tug for compensation to the construction firm so that the latter could transport its own property in interstate commerce, he was engaging in the business of a contract carrier by water, as that term is defined in the Act. Section 302(e), 49 U.S.C. § 902(e), provides in part:

> "The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water.' . . ."

He contends, however, that in embracing the kind of vessel-furnishing business which he operates within the statutory term "contract carrier by water," and consequently requiring one who would engage in such a business to obtain a permit from the Commission, section 302(e) of the Act offends the Due Process Clause of the Fifth Amendment.

Two arguments are advanced in support of this contention. The first of these, and the one which we will first discuss, is that under the Due Process Clause no business may be subjected to permit or certificate regulation unless it is one which is "affected with a public interest," or stated differently, "impressed with a public purpose." The business of furnishing a vessel for compensation to one who intends to and does use it to transport his own property in interstate commerce, appellant asserts, is not a business affected with a public interest or impressed with a public purpose.

Appellant concedes that the United States may constitutionally exercise some regulation over the water transportation equipment which he furnishes for use in interstate commerce. He cites rates, safety and security to the public for liability incurred in the operation of leased equipment as permissible subjects of federal regulation.

He argues, however, that his business is not one which he may be constitutionally precluded from conducting. The record does not indicate that appellant has ever applied for and been denied a permit to lease his equipment to private shippers for use in transporting their own goods. But appellant argues that since his operation is characterized as that of a contract carrier, and since contract carriers are required to obtain a

permit which the Commission may grant or deny on the basis of public convenience and necessity, this entire aspect of the Act is based on the assumption that his operation might be prohibited entirely.[2]

In support of his thesis appellant relies primarily on three decisions of the Supreme Court and three state court decisions. In discussing these and other cases we will consider first, whether the concept "affected with a public interest" currently receives federal judicial recognition for any purpose, and second, whether in any event it has applicability in testing the validity of federal legislation under the Commerce Clause.

In two of these Supreme Court cases, *Michigan Utilities Commission v. Duke*, 266 U.S. 570 (1925) and *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583 (1926), the state statutes invalidated required contract carriers by motor vehicle to assume all of the duties and burdens of a common carrier.[3] The Court did not specifically refer to the concept "affected with a public interest" in either case. In *Duke*, however, it did refer to *Wolff Co. v. Industrial Court*, 262 U.S. 522, 535, in which that concept was applied.

[2]No issue as to how other economic regulations would affect him if he held a contract carrier permit is presented in this case and any such issue would be premature. See *Champlin Refining Co. v. United States*, 329 U.S. 29; *United States v. Champlin Refining Co.*, 341 U.S. 290.

[3]These decisions were so construed by the Supreme Court in *Stephenson v. Binford*, 287 U.S. 251, 266-267. See also *California State Automobile Association Inter-Insurance Bureau v. Maloney*, 341 U.S. 105, 108.

The import of these cases is illustrated by the Court's statement in *Duke* (pages 577-578):

> "... it is beyond the power of the State by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, ..."

Considered in the light of the problem there presented, these words do not support the view that a private carrier's right to operate may not be made to depend upon a finding of public convenience and necessity. But if *Duke* and *Frost* ever were authority for such a proposition, they are no longer so in view of *Nebbia v. New York*, 291 U.S. 502, discussed below.

The third and final Supreme Court decision primarily relied upon by appellant in support of the Due Process argument under discussion is *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). It was there held that the business of manufacturing and selling ice is essentially a private business and not so affected with a public interest that a state legislature may constitutionally limit the number of those who may engage in it, in order to control competition.

But two years after *Liebmann* was handed down, the Supreme Court decided *Nebbia v. New York*, 291

U.S. 502. In that case the concept "affected with a public interest" was abandoned as a test to be applied in determining whether a business could, consistent with due process, be subjected to economic regulation.[4]

While *Nebbia* involved price regulation, the rationale there adopted by the Court is equally applicable with regard to all economic regulations.[5] The contrary rationale of *Liebmann* has not been applied or approved in any subsequent case.[6] Quite to the contrary, the Supreme Court, in 1946, cited with approval the dissenting opinion of Justice Brandeis in that case. See *Fay v. New York*, 332 U.S. 261, 296.

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[4]Likewise, in *Breard v. Alexandria*, 341 U.S. 622, 632 (1951), the Supreme Court stated that:

". . . neither case [including *Liebmann*] is in as strong a position today as it was when Bunger appealed. See *Olsen v. Nebraska*, 313 U.S. 236, 243, et seq., and *Lincoln Union v. Northwestern Co.* . . ."

The reference to the "Bunger" appeal is to *Town of Green River v. Bunger*, 50 Wyo. 52, 58 P.2d 456 (1936).

[5]See, for example, *Breard v. Alexandria*, 341 U.S. 622, 632, wherein the validity of a so-called "Green River ordinance," forbidding house-to-house soliciting, was upheld, and in which *Nebbia* was cited as authority for the result reached.

In "The Federal Regulation of Transportation," West Publishing Co., 1953, at page 51, Professors Carl A. Auerbach and Nathaniel L. Nathanson state: "The denouncement of this doctrinal development came with Nebbia. . . ." In 1 Davis, Administrative Law Treatise, § 3.09, page 205, Professor Davis states: "The concept of business affected with a public interest has now disappeared from federal constitutional law." In support of this view the author cites *Olsen v. Nebraska*, 313 U.S. 236, and *Nebbia*.

As indicated in note 4, the *Liebmann* decision was also questioned, on a somewhat different ground, in *Breard v. Alexandria*, 341 U.S. 622, 632.

[6]There are non-committal references to that decision in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp*, 299 U.S. 183, 192; and *Olsen v. Nebraska*, 313 U.S. 236, 244, note 5.

In the face of this doctrinal change of position by the Supreme Court, the fact that certain state courts[7] still adhere to Chief Justice Waite's "affected with a public interest" dictum announced in *Munn v. Illinois*, 94 U.S. 113, 126, is without significance in federal adjudication.

Moreover, we find no indication that the "affected with a public interest" test has ever been applied to determine the validity of federal legislation enacted under authority of the Commerce Clause.[8]

The exercise of the commerce power is subject to the Due Process Clause of the Fifth Amendment. See *United States v. Carolene Products Co.*, 304 U.S. 144, 147-148; *F. & A. Ice Cream Co. v. Arden Farms Co.*, 98 F.Supp. 180, 182-183. But the requirements of due process are satisfied if the law passed in the exercise of the Commerce Clause has a reasonable relation to a legitimate legislative purpose and is not arbitrary, capricious or discriminatory. If "the means chosen are appropriate to the permissible end, there is little scope for the operation of the due process clause." *Virginian*

[7]The state decisions primarily relied upon by appellant are: *Brinks Express Company v. Public Service Commission*, 117 Pa. Super. 268, 178 Atl. 346; *Hertz Driveurself Stations, Inc. v Siggins*, 359 Pa. 25, 58 A.2d 464; *Hertz Corporation v. Heltzel and Snyder, et al.*, 217 Ore 205, 341 P.2d 1063.

[8]This is not to say that the public's interest in particular legislative objectives has not been considered in determining the constitutionality of various Congressional exercises of the commerce power. *E.g., Wilson v. New*, 243 U.S. 332, 346-347. But appellant has not cited, nor have we found, any cases in which the concept "affected with a public interest" has been specifically applied to determine the due process validity of federal economic regulation.

Railway Co. v. System Federation No. 40, 300 U.S. 515, 558.[9]

Apart from his "affected with a public interest" argument, however, appellant seeks to show that section 302(e), as here applied, has no reasonable relation to a proper legislative purpose and is therefore arbitrary.[10] He does so by quoting a comment in a decision of the Commission concerning the need of such legislation, and then striving to demonstrate the unsoundness of the comment. This Commission comment, quoted below, is contained in *G. M. Cox Shipyard, Inc.*, 260 I.C.C. 20, 21:

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[9]Since Congress has expressly been given the power to regulate interstate commerce, the permissible ends of its regulation have been more easily and early defined. Thus, in *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 229, the Supreme Court held that despite the Fifth Amendment, ". . . the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those contracts which directly and substantially . . . regulate to a greater or less degree commerce among the States." And in *Tagg Bros. v. United States*, 280 U.S. 420, 439, the Congressional power to regulate commission rates charged by livestock buyers and sellers was sustained against a due process challenge, not because the business concerned was "affected with a public interest," but because the purpose of the regulation was to prevent an "undue burden upon, and obstruction of" interstate commerce.

The process of delimiting the permissible ends of state exercises of the police power has been a more tortuous one, however. The concept "affected with a public interest" is a product of one stage in this evolutionary process. It served, for a time, to define the permissible ends of state economic regulation.

[10]As stated above, supported by the authority of *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 558, this is the test to be applied in measuring the constitutionality, under the Due Process Clause of the Fifth Amendment, of federal legislation enacted pursuant to the Commerce Clause. Incidentally, it is also the test now applied in measuring the constitutionality, under the Due Process Clause of the Fourteenth Amendment, of state legislation enacted in the exercise of the police power. Thus, in *Nebbia v. New York*, 291 U.S. 502, which sounded the death knell of the "affected with a public interest" test, insofar as federal adjudication is concerned, the court said, at page 537:

". . . If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. . . ."

". . . Regulation of applicant and other furnishers of vessels, as contemplated by section 302(e), results from their position in the national transportation system. They provide a pool of equipment from which other carriers draw during emergencies and peak-load periods. Unregulated use of this pool of equipment by shippers well might place them in the position of being able to use the charter market as leverage to enforce their demands for unreasonable rates and discriminatory service from common and contract carriers. . . ."[11]

Appellant points out that, in this observation, the Commission indicated that the legislation was designed to meet a condition which "might well" develop, not one which "would" develop. Appellant believes that "might well" is too speculative.

Due process does not require Congress to surrender foresight based on its judgment as to reasonable possibilities. Its sanctions do not demand that the legislative hand be stayed until an anticipated evil has become a reality or demonstrably inevitable. In our opinion it is a proper legislative purpose to deal with conditions inimical to the public interest which, in the judgment of Congress, "might well" come about unless something is done about it.

Appellant's next observation concerning the quoted Commission comment is that the Commission was fear-

[11]The quoted comment first appeared in *C. F. Harms Company Contract Carrier Application*, 250 I.C.C. 513, 516.

ful of the rates the owners of such equipment might charge—not that the existence of the pool of equipment was in and of itself bad.

Vessel-furnishers could not long remain in that business unless their rates were low enough to attract shippers away from currently regulated common and contract carriers. Thus it was reasonable for Congress to assume that when vessels are offered for lease to shippers competitive pressure is exerted upon regulated carriers. The control of that pressure was a proper legislative purpose and the statutory means of doing so —requiring permit authority—has a reasonable relation to that purpose.

Finally, appellant asserts that the quoted Commission comment indicates that the persons being protected were not members of the public but only the common and contract carriers already certified.

The maintenance of a stable and adequate system of common and contract carriers by water is a stated objective of the national transportation policy.[12] Insofar as the immediate effect of the regulations here in question may be advantageous to established common and contract carriers, the same is warranted as a means of attaining that objective.

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[12]See Act September 18, 1940, c. 722, Title 1, § 1, 54 Stat. 899, 49 U.S.C.A., preceding section 1.

Appellant advances two other lines of argument under this branch of the case. Posing a series of hypothetical cases involving the attempted regulation of one who leases a hotel to another, one who leases an ice plant to another, or one who constructs a private grain elevator for his own use, he rhetorically asks, "Can this possibly be justified?"

None of these assumed factual situations predicate a relationship between the named activity and a line of business activity then being properly subjected to economic regulation. In this critical respect appellant's hypothetical cases are not like the one before us.

Appellant calls attention to a long line of cases in which it has been held that a lessor of transportation equipment is not a "carrier." But in our case this has been accomplished by statutory definition. It is not significant, however, that Congress has chosen to so categorize persons who lease vessels. It could have termed them "vessel furnishers" and subjected them to the same regulation as contract carriers by water.

Where the legislative judgment as to reasonableness is drawn into question, the judicial inquiry is restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. *United States v. Carolene Products Co.*, 304 U.S. 144, 154.

There are no stated facts in this record bearing upon this question. It follows that the statute must be deemed to have a reasonable basis in fact unless the contrary is apparent from the face of the statute or from facts which may be judicially noted. In our opinion the statute here under question is not vulnerable in either of these respects.

The other due process argument which appellant makes concerning section 302(e) of the Act is that the statute effectuates an arbitrary, unjust, and discriminatory classification whereby vessel-furnishers are subjected to economic regulation, but private lessors of motor vehicle and rail equipment are not so regulated.

The factual premise of this argument cannot be questioned. The private lessors of vessels are subjected to economic regulation under Part III of the Interstate Commerce Act, whereas private lessors of rail and motor vehicle equipment are not subjected to economic regulation under Parts I and II of that Act, respectively.[13] It may also be judicially noticed that interstate water carriers are in active competition with interstate

[13]As appellant points out, when this legislation was before Congress, its attention was specifically directed to the fact that, under section 302(e), vessel-furnishers would be regulated whereas private lessors of rail and motor vehicle equipment were not regulated under the Act. But, notwithstanding, Congress deliberately chose to regulate vessel-furnishers and, in the process, rejected an amendment which, on the ground of preserving uniformity, would have expressly excluded vessel-furnishers from regulation. See 84 Cong. Rec. 9979; 86 Cong. Rec. 5858.

rail and motor vehicle carriers. See *Cornell Steamship Co. v. United States*, 321 U.S. 634, 637.

The Fifth Amendment, unlike the Fourteenth Amendment, contains no equal protection clause. Nor does the Constitution provide any other express guarantee against discriminatory legislation by Congress. But while due process and equal protection cannot be perfectly equated, discriminatory federal legislation may be so removed from any legitimate legislative objective that it violates that basic fairness which constitutes Fifth Amendment due process. *Bolling v. Sharpe*, 347 U.S. 497.

In *Bolling v. Sharpe* the Court dealt with a federally administered program which included systematic and conscious discrimination against members of the Negro race. The Court held that discrimination based on racial differences can have no proper legislative purpose, and so offends the Due Process Clause of the Fifth Amendment.

It is this type of discrimination that appellant would have us find in the legislation now before us. But at most, appellant has called attention to a lack of uniformity in the way that Congress has exercised its power under the Commerce Clause. He has failed to demonstrate that the lack of uniformity in the legislation as it now exists is inappropriate to any proper

legislative purpose. His argument wholly fails to take into account that "a legislature may hit at an abuse which it has found, even though it has failed to strike at another." *United States v. Carolene Products Co.*, 304 U.S. 144, 151.[14]

We conclude that the Due Process Clause of the Fifth Amendment is not violated by section 302(e) of the Act, as applied under the facts of this case.

The judgment is affirmed.

(Endorsed) Opinion Filed Nov. 19, 1962.

Frank H. Schmid, Clerk.

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[14]Similarly in *Currin v. Wallace*, 306 U.S. 1, 14, involving the validity, under the Fifth Amendment, of an act which authorized inspection and grading of tobacco auctioned at tobacco warehouses designated by the Secretary of Agriculture, leaving other warehouses free of such regulation, the Court said:

". . . There is no requirement of uniformity in connection with the commerce power. . . .

". . . It is the essence of the plenary power conferred [under the Commerce Clause] that Congress may exercise its discretion in the use of the power. Congress may choose the commodities and places to which its regulations shall apply. Congress may consider and weigh relative situations and needs. Congress is not restricted by any technical requirement but may make limited applications and resort to tests so that it may have the benefit of experience in deciding upon the continuance or extension of a policy which under the Constitution it is free to adopt. As to such choices, the question is one of wisdom and not of power."

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARELL V. BOYLAN,
Appellant
vs.
UNITED STATES OF AMERICA,
Appellee

No. 17,672
JUDGMENT

APPEAL from the United States District Court for the ..... District of ..... Oregon .....

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ..... District of ..... Oregon .... and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is ..... affirmed. .....

Filed and entered November 19, 1962

Appendix "C"

Fifth Amendment:

"No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

Title 49, U.S.C. Section 902(e):

"For the purpose of this chapter —

* * * * *

(e) * * * The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this chapter and chapters 1 and 8 of this title, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'. * * *"

Title 49, U.S.C. Section 909(f):

"Except as otherwise provided in this section and section 911 of this title, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit issued by the Commission authorizing such operation; * * *"

Title 49, U.S.C. Section 917(a):

"Any person who knowingly and willfully violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate or permit, for which no penalty is otherwise provided, shall be deemed guilty of a misdemeanor and upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was in whole or in part committed shall be subject for each offense to a fine not exceeding $500. Each day of such violation shall constitute a separate offense."

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 754

DARRELL V. BOYLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B, 38–52) is at 310 F. 2d 493.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1962 (Pet. App. B, 53). On December 19, 1962, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including January 18, 1963, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Congress has the constitutional power to prohibit engaging in the business of furnishing ships for compensation without a permit from the Interstate Commerce Commission.

STATUTES INVOLVED

The Interstate Commerce Act, Part III, Sec. 302 (e) (49 U.S.C. 902(e)):

> The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation * * * by water of passengers or property in interstate or foreign commerce for compensation.
>
> The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of "contract carrier by water". * * *

The Interstate Commerce Act, Part III, Sec. 309 (f) (49 U.S.C. 909(f)):

> Except as otherwise provided in this section and section 311, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation * * *.

The Interstate Commerce Act, Part III, Sec. 317 (a) (49 U.S.C. 917(a)):

> Any person who knowingly and willfully violates any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate or permit, for which no penalty is otherwise pro-

vided, shall be deemed guilty of a misdemeanor and upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was in whole or in part committed shall be subject for each offense to a fine not exceeding $500. Each day of such violation shall constitute a separate offense.

STATEMENT

By information filed in the United States District Court for the Eastern District of Washington, petitioner was charged with engaging in the business of a contract carrier by water without first obtaining a permit from the Interstate Commerce Commission as required by the Interstate Commerce Act, Part III, *supra* (R. 5). It was stipulated that on April 27, May 5, and May 11, 1960, petitioner, for compensation, furnished a tug to a construction firm, which used the tug to tow the firm's construction equipment in interstate commerce (R. 8). Petitioner held no permit on any of these occasions; the proceedings requesting a permit (of which petitioner asks the Court to take official notice, Pet. 7, fn. 2) were not commenced by petitioner until August 11, 1960 (Interstate Commerce Commission Docket W-1147).

Petitioner moved to dismiss on the ground that the statute was unconstitutional (R. 6). The motion was denied (R. 9) and petitioner was adjudged guilty. A fine of $400 was imposed on the first count. Imposition of sentence was suspended on the remaining two counts, and petitioner was placed on probation for three years (R. 10). Upon appeal, the judgment was affirmed (Pet. App. B, 53).

ARGUMENT

Petitioner offers this litigation as a "test case" (Pet. 5) presenting important questions of "first impression" (Pet. 9). But the fact that the statute has been in operation twenty-two years without open attack upon its constitutionality shows that there are no serious constitutional questions. Nor is the case made a compelling vehicle to resolve those supposed issues merely because the offender has no defense on the undisputed facts and can defend only upon contentions concerning the law. In our view, the application of the vessel-furnisher provisions of the Interstate Commerce Act in the present context presents no difficult or novel questions of significance.

The purpose of the challenged provisions was early explained (*G. M. Cox Shipyard, Inc.*, 260 I.C.C. 20, 21):

> Regulation of applicant and other furnishers of vessels, as contemplated by section 302(e), results from their position in the national transportation system. They provide a pool of equipment from which other carriers draw during emergencies and peak-load periods. Unregulated use of this pool of equipment by shippers well might place them in the position of being able to use the charter market as leverage to enforce their demands for unreasonable rates and discriminatory service from common and contract carriers. * * *

Congress, at the time of enactment, deliberately rejected an amendment which would have excluded vessel-furnishers from regulation. 84 Cong. Rec. 9979; 86 Cong. Rec. 5858. As this Court said in

Barrett Line v. *United States*, 326 U.S. 179, 196, a case involving the grant of a "grandfather" permit to lease vessels under this Act:

> The obvious purpose was to secure full regulation of the traffic, by application of the Act's provisions to the lessee, if he should be a regulated carrier, thus exempting the lessor in that situation; otherwise to the lessor.

1. Petitioner broadly asserts that the lease of vessels "could not and does not directly or substantially affect interstate commerce" (Pet. 7). But he does not carry his burden in the face of a Congressional finding to the contrary. Instead, petitioner seizes upon the language of the Commission in the decision already quoted to the effect that the unregulated activity of vessel furnishers "might well" undermine the national transportation policy, and he contends that "there was no direct finding that this indubitably would happen" (Pet. 27). The short answer is that the Commission's restraint does not necessarily reflect doubt in the minds of the legislators. But, in any event, as the court of appeals below said (Pet. App. B, 47)—

> Due process does not require Congress to surrender foresight based on its judgment as to reasonable possibilities. Its sanctions do not demand that the legislative hand be stayed until an anticipated evil has become a reality or demonstrably inevitable.[1]

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[1] Petitioner's reliance upon the second *Champlin* decision of this Court (*United States* v. *Champlin Refining Company*, 341 U.S. 290) is misplaced. The Champlin Company was using its pipeline entirely for its own products and was not selling its

2. Petitioner next argues that the statute is impermissibly vague because it may or may not apply to the lessee who carries only exempt commodities in the leased vessel (Pet. 2–3, 8, 10–19). But no such issue is presented in this case where no claim is made that exempt commodities were transported by the lessees. See *Jeffrey Mfg. Co.* v. *Blagg*, 235 U.S. 571, 576.

In any event, there is no basis for petitioner's assertion that the industry is "in a quandary" concerning the interpretation of the statute (Pet. 10). In *Barrett Line* v. *United States*, *supra*, 326 U.S. 179, this Court indicated no difficulty in this respect, twice stating that a vessel-furnisher leasing to one carrying only exempt commodities does not require a permit (326 U.S. at 189, 194). As to the suggestion that the lessor of a vessel could not effectively protect himself against a lessee's use of the vessel without permission to transport non-exempt commodities, or that vessel-furnishers could vitiate the fair application of the statute by pleading unawareness of the non-exempt commodities transported by their lessees, such cases would merely pose factual issues of intent and wilfulness—problems with which courts must deal in many contexts. See *e.g.*, *United States* v. *Drum*, 368 U.S. 370, in which a purported private motor transportation practice was found to be, in fact, an activity subject to regulation.

Finally, petitioner challenges the legislation on the ground that similar regulation is not applied in areas which he assumes to be comparable. Thus, he

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use to others. Here, petitioner was leasing his vessel to others, thereby placing it in competition with regulated water carriers.

complains that a vessel furnisher is not prohibited from furnishing a vessel to a shipper in foreign commerce (Pet. 29); that a person with goods to ship can buy a vessel and ship without economic regulation (Pet. 9–10, 12–13, 30); and that a vessel furnisher is denied the right to lease his equipment "when other types of carriers are not so prohibited" (Pet. 8). The answer is, of course, that Congress may legislate with respect to one problem at a time. It may "hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent". *Hirabayashi* v. *United States,* 320 U.S. 81, 100. See also *United States* v. *Petrillo,* 332 U.S. 1, 8–9; *Currin* v. *Wallace,* 306 U.S. 1, 14.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1963.

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